

**NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED,
DETERMINED.**

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION**

**NEW PLAZA OF ST. PETE, INC.,
Petitioner,**

**Case No.:15-000036AP-88A
UCN: 522015AP000036XXXXCV**

v.

**CITY OF ST. PETERSBURG, FLORIDA,
NUISANCE ABATEMENT BOARD,
Respondent.**

Opinion Filed _____

Petition for Writ of Certiorari
from decision of Nuisance
Abatement Board
St. Petersburg, Florida

Walter E. Smith, Esq.
Attorney for Appellant

Jacqueline M. Kovilaritch, City Atty
Sharon Michnowicz, Asst. City Atty
Attorneys for Appellee

PER CURIAM.

New Plaza of St. Pete, Inc. seeks certiorari review of the "Findings of Fact, Conclusions of Law, and Order Assessing Fines and/or Costs" of the City of St. Petersburg, Nuisance Abatement Board entered against New Plaza of St. Pete, Inc. and Cactus Charlies, Inc., on April 15, 2015. We affirm.

Statement of Facts

Cactus Charlies, Inc. is not a petitioner in this matter, but was represented by counsel at the hearings before the Nuisance Abatement Board ("Board").

New Plaza of St. Pete, Inc. is the owner of the real property and commercial buildings located at 400 34th Street North, St. Petersburg, Florida. There are two

buildings located on the real property, one encompasses the New Plaza Motel ("Motel") and one encompasses the Cactus Charlie's Lounge ("Bar"). Hereinafter collectively referred to as "the Premises."

On June 20, 2013, in City of St. Petersburg v. New Plaza of St. Pete, Inc., Nuisance Abatement Board Case No. 2013-03, a complaint was filed for abatement of a nuisance at the Premises as defined by St. Petersburg City Code, section 19-41 and as authorized by section 893.138(11), Florida Statutes (2012-2013). On July 9, 2013, New Plaza of St. Pete, Inc. as the owner of the Premises entered into a Stipulation and Agreement in the case and acknowledged that the information contained in the complaint was true and correct and the conduct described therein constituted a nuisance. New Plaza of St. Pete, Inc. agreed, at a minimum, to take fifteen listed actions to abate the drug activity at the Premises. New Plaza of St. Pete, Inc. acknowledged that the Board retained jurisdiction over the Premises for a period of one year from the effective date of the order accepting the stipulation. The Order Accepting the Stipulation was entered on July 10, 2013.

On March 4, 2015, in City of St. Petersburg v. New Plaza of St. Pete, Inc., Nuisance Abatement Board Case No. 2015-01, an amended complaint was filed for abatement of a nuisance at the Premises as defined by St. Petersburg City Code, section 19-41 and as authorized by section 893.138(11), Florida Statutes (2014). The amended complaint references the proceedings in Case No. 2013-03. Further, the amended complaint lists seven instances of alleged purchases of illegal substances on the Premises during the time period of April 4, 2014, through September 18, 2014.

On March 11, 2015, and April 8, 2015, hearings were conducted before the Board at which counsel for New Plaza of St. Pete, Inc. and counsel for Cactus Charlies, Inc., appeared. On April 15, 2015, the Board entered the "Findings of Fact, Conclusions of Law, and Order Assessing Fines and/or Costs" (hereinafter the "April 15, 2015, order").

In the April 15, 2015, order, the Board found that the City had established by clear and convincing evidence six instances of illegal conduct alleged in paragraphs ten through fifteen of the Amended Complaint. These instances were alleged to have been

committed August 12, 2014, through September 18, 2014. The Board concluded that City Code section 19-41(e) had been violated. Section 19-41 states in part:

(e) The board shall hear complaints alleging that any place or premises constitutes a public nuisance, and may find said place or premises, or any part thereof, to be a public nuisance, upon clear and convincing evidence that said place or premises has been used:

(1) On one occasion as the site of the unlawful possession of a controlled substance, where such possession constitutes a felony, and that has been previously used on more than one occasion, all within a six-month period, as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;

....

(3) On more than two occasions within a six-month period, as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance

The April 15, 2015, order directed New Plaza of St. Pete, Inc. and Cactus Charlies, Inc. to fulfill seventeen conditions to remedy the nuisance existing on site. Additionally, New Plaza of St. Pete, Inc. and Cactus Charlies, Inc. were jointly and severally fined \$250.00 for each of the six dates on which illegal activity occurred for a total of \$1,500.00.

New Plaza of St. Pete, Inc. filed the Amended Petition for Writ of Certiorari challenging the April 15, 2015, order.

Standard of Review

Under section 162.11, Florida Statutes (2015), an appeal of a code enforcement board's order to the circuit court "shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board." Sarasota County v. Bow Point on Gulf Condo. Developers, LLC, 974 So. 2d 431, 433 n.3 (Fla. 2d DCA 2007). When the circuit court in its appellate capacity reviews local governmental administrative action, there is a three-part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative agency's findings and judgment are supported by competent, substantial evidence. Lee County v. Sunbelt Equities, II, Ltd. P'ship, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993). The circuit court is not entitled to

make separate findings of fact or to reweigh the evidence. Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 529 (Fla. 1995).

Analysis

Procedural Due Process

(1) New Plaza of St. Pete, Inc. argues that procedural due process was not accorded because it "was given no prior notice of the undercover activity that the City was initiating or given any opportunity to abate the alleged nuisance." New Plaza of St. Pete, Inc. cites to Maple Manor, Inc. v. City of Sarasota, 813 So. 2d 204 (Fla. 2d DCA 2002), and Powell v. City of Sarasota, 857 So. 2d 326 (Fla. 2d DCA 2003), in support of its argument.

New Plaza of St. Pete, Inc. asserts that, as in Powell, the commencement of the nuisance abatement action was the first notice afforded by the City about the criminal activity on the premises as the police investigation had not been revealed to it. Further, citing Maple Manor, New Plaza of St. Pete, Inc. notes that the appellate court in that case held that an "adequate opportunity to voluntarily abate a nuisance had to be afforded to a property owner before penalties are imposed against the property owner pursuant to the ordinances."

New Plaza of St. Pete, Inc.'s arguments concerning notice are not well taken. Nothing in section 893.138 requires that the owner of a premises be notified of criminal activity prior to commencement of a nuisance abatement action.¹ Additionally, Maple Manor and Powell involve violations of the City of Sarasota Code of Ordinances governing nuisances. The City of Sarasota Code contains a provision specifying that notice of criminal activity and an opportunity to abate must be given when the premises alleged to be a nuisance is not owner occupied. See City of Sarasota Code of Ordinances § 2-269(c).² The City of St. Petersburg Code of Ordinances concerning

¹ The only notice requirement in section 893.138 is that "[a]ny employee, officer, or resident of the county or municipality may bring a complaint before the board after giving not less than 3 days' written notice of such complaint to the owner of the place or premises at his or her last known address." § 893.138(4), Fla. Stat.

² City of Sarasota Code of Ordinances, section 2-269(c) states:

(c) If the place or premises alleged to be a nuisance is not owner-occupied property, then there shall be no presumption that the property owner has knowledge that any illegal activities constituting a public nuisance are occurring on his or her property. In this event, the property owner shall not initially be served with a complaint for abatement of nuisance as provided in subsection (a) above. Instead, the property owner shall be served with an initial written notice advising that criminal activity that might constitute a public nuisance is

nuisances contains no such notice or abatement opportunity requirement. See City of St. Petersburg Code of Ordinances §§ 19-40 through 19-44. The appellate decisions in Maple Manor, 813 So. 2d 204, and Powell, 857 So. 2d 326 are distinguishable on their facts and under the governing City Ordinances. New Plaza of St. Pete, Inc.'s arguments are without merit.

(2) New Plaza of St. Pete, Inc. argues that procedural due process was not accorded because several members of the Board acted as judge and prosecutor.

This Court has reviewed the transcript of the March 11, 2015, and April 8, 2015, hearings before the Board and concludes that there was no due process violation.

(3) New Plaza of St. Pete, Inc. argues that procedural due process was denied because its counsel was not given the opportunity to cross-examine witnesses concerning new matters that allegedly had been raised by the City Attorney or the Board members.

This Court has reviewed the transcript of the March 11, 2015, and April 8, 2015, hearings before the Board and concludes that there was no due process violation.

Competent, Substantial Evidence

(1) New Plaza of St. Pete, Inc. argues that there is no competent, substantial evidence of any drug activity occurring at the Motel. It is asserted that the only drug activity alleged in the Amended Complaint for which competent, substantial evidence was presented was drug activity initiated by the City of St. Petersburg Police Department to purchase drugs in the Bar. New Plaza of St. Pete, Inc. argues that the City was the sole instigator of the drug activity and the City should not be permitted to create a nuisance at the Bar and then penalize New Plaza of St. Pete, Inc. as the property owner and landlord.

However, in its Initial Brief, New Plaza of St. Pete, Inc. concedes that there were two instances when drug purchases on the Premises took place outside of the Bar. (Init. Br. p. 9). New Plaza of St. Pete, Inc. is the owner of the real property and

occurring on his or her property. Such initial notice shall further provide that the property owner shall have a specified period of time to abate the alleged public nuisance by ending the criminal activity. The period of time given to abate the nuisance may vary depending on the facts of the particular case, but in no event shall be less than sixty (60) days. Should the alleged public nuisance continue beyond the time provided for abatement, a complaint for abatement of nuisance may be filed with the city auditor and clerk and presented to the board for hearing and determination in accordance with subsection (a) above.

(Emphasis added).

commercial buildings where the Motel and Bar operate. The entire area that encompasses the Premises is under the control of New Plaza of St. Pete, Inc. as it is the owner of the land and buildings located thereon, including the Motel and the Bar.

Additionally, whether the violations of section 893.138 or City Code section 19-41 occurred at the Bar (as has been conceded in the Initial Brief), within the Motel, or in the parking lot of the two establishments is irrelevant. Section 893.138(2) broadly states that "[a]ny place or premises" that has been in violation of criminal statutes as specified may be declared to be a public nuisance, and such nuisance may be abated pursuant to the procedures provided. Further, the City Code section 19-41(a) defines place or premises as follows:

Place or premises means real property and its appurtenances and structures thereon as described in the deed or other instrument of conveyance as recorded in the Public Records of Pinellas County, Florida. The term "place" or "premises" includes but is not limited to parking lots and other areas open to the general public or to invitees or licensees.

Testimony was presented that illegal activity in violation of section 893.138 occurred on the Premises. The violations encompass the entire Premises.

The Board considered evidence of seven instances of illegal conduct on the Premises as alleged in the "Amended Complaint for Abatement of Nuisance" and found that six instances of illegal conduct occurring between August 12, 2014, and September 18, 2014, had been proven.

Upon review of the evidence presented to the Board, this Court concludes that competent, substantial evidence supports the Board's findings in the April 15, 2015, order that there was illegal conduct on the Premises that violated section 893.138 and the City Code.

Essential Requirements of Law

(1) New Plaza of St. Pete, Inc. argues that the April 15, 2015, order dictating that the Motel must maintain the identity of every guest and share it with the police on request is patently illegal. It is asserted that such a requirement violates the Motel's privacy rights and the privacy rights of its guests.

The April 15, 2015, order states in part:

1. Respondents must utilize room cards which list the names of all guests and copies of state-issued, photo identification for all persons above the age of 18.

4. Respondents must allow access of all room cards and supporting documentation, as well as to create a database of that information, to be provided to law enforcement personnel upon request, unless specifically precluded by law.

New Plaza of St. Pete, Inc.'s argument that the requirement that the Motel provide guest information is patently illegal has no merit as the April 15, 2015, order specifies that the information need not be provided if precluded by law. The Motel or any guest may object to the request to supply the information.

(2) New Plaza of St. Pete, Inc. asserts that the remedial measures are not specially tailored to the objectionable conduct and unnecessarily infringe on the conduct of a lawful enterprise, the Motel.

New Plaza of St. Pete, Inc. states that the Bar and the Motel are separate entities. The Bar is New Plaza of St. Pete, Inc.'s tenant and "all of the alleged objectionable conduct (the alleged nuisance) occurred at the Bar." New Plaza of St. Pete, Inc. asserts that the remedial measures directed to the Motel should be vacated.

As discussed above, the nuisance activities on the Premises did not occur only at the Bar. This Court concludes that the Board did not depart from the essential requirements of law because the remedial requirements in the April 15, 2015, order are sufficiently narrowly tailored to abate the nuisance on the Premises.

(3) New Plaza of St. Pete, Inc. asserts that the remedial measures imposed by the Board are so restrictive that they constitute a compensable taking under the Fifth Amendment to the United States Constitution. In the petition, New Plaza of St. Pete, Inc. states:

Under the facts and circumstances of this case, the Board's remedial measures of requiring New Plaza to hire off duty police at a cost of at least \$84,000/year, and in the discretion of the police, possibly twice that amount, is not economically feasible and will result in the closing of the motel, thereby depriving the owner of all economic benefits. This constitutes a taking without compensation.

In support of its argument, New Plaza of St. Pete, Inc. cites to City of St. Petersburg v. Bowen, 675 So. 2d 626 (Fla. 2d DCA 1996).

The Bowen opinion relied upon by New Plaza of St. Pete, Inc., involves an inverse condemnation action brought by the owner of an apartment complex. The Bowen case does not involve a petition for writ of certiorari challenging a finding that a premises constitutes a nuisance, but was an independent action for damages. New Plaza of St. Pete, Inc. has not filed an action for inverse condemnation and this issue is not properly raised in a petition for writ of certiorari challenging an order from a municipal Nuisance Abatement Board.

Conclusion

This Court concludes that procedural due process was accorded, and the Board's April 15, 2015, Order is supported by competent, substantial evidence, the essential requirements of law have been observed, and remedial measures were properly imposed. The Petition for Writ of Certiorari is denied.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this
10 day of February, 2016.

Original Order entered on February 10, 2016, by Circuit Judges Linda R. Allan, Jack R. St. Arnold, and Keith Meyer.

Copies furnished to:

Walter E. Smith, Esq.
757 Arlington Ave. North
St. Petersburg, FL 33701

Jacqueline M. Kovilaritch, City Atty
Sharon Michnowicz, Asst. City Atty
P.O. Box 2842
St. Petersburg, FL 33731

Christopher Ferguson, Esq.
770 Second Ave. South
St. Petersburg, FL 33701